



CLAIM NO. CD-15-042021
CHILD REMOVAL ORDER



Court in the middle



KEY POINTS

What is the issue?

In an increasingly globalised world, the issue of child relocation or permanent removal as a result of relationship breakdown is often thrust to the forefront of family law proceedings.

What does it mean for me?

Courts in various jurisdictions deal with this issue differently: fortunately, England and Wales, Hong Kong and Singapore courts have much in common.

What can I take away?

A comparison of the different approaches taken by England and Wales, Hong Kong and Singapore courts.



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RITA KU, SUZANNE TODD, IVAN CHEONG AND PHILIPPA HEWITT COMPARE CHILD REMOVAL APPLICATIONS IN ENGLAND AND WALES, HONG KONG AND SINGAPORE

Child relocation, or the application to permanently remove a child from a jurisdiction following relationship breakdown, represents one of the most difficult aspects of family law to come before the court, no matter the jurisdiction. It is one of the few examples where the court makes a binary decision and there is little scope for compromise. England and Wales, Hong Kong and Singapore all attract multicultural families and expatriates from all over the world to work and live in their cities. Each country has individuals who choose to work abroad for a period of time, but the question is: are they aware of all the implications that are involved in moving a family? Will they be able to leave the chosen jurisdiction without applying to court, and how will this impact their families?

Fundamentally, the basics of family relocation, especially where it involves children, should form part of all decisions to relocate.

SIMILARITIES BETWEEN ENGLAND AND WALES, HONG KONG AND SINGAPORE

The key factor common to each jurisdiction is that the court must make an order that is in the best interests of the children. The court always undertakes an extensive evaluation of all the relevant circumstances.

There is no presumption in favour of the parent or the primary carer seeking to move overseas. The court should consider, as one of the factors at play, whether refusing the primary carer's reasonable proposals for relocation would have a detrimental impact on the welfare of their dependent children because of the refusal's impact on that carer. The rationale behind the well-known English and Welsh case of *Payne v Payne* was that a child's happiness and security depended

on the wellbeing of their primary carer,¹ traditionally the mother, and the court should, therefore, be slow to interfere with her reasonable proposals.

The potential loss of relationship between the child and the parent that will be 'left behind' if the relocation takes place is another important factor. It is generally agreed that it is in every child's best interests to have both parents physically present and involved in their lives. The stronger the relationship with the child and the more involved each parent is in the child's life, the more the child will feel the loss if they relocate overseas.

Another common factor is whether there is a genuine motivation for the move and not simply a desire to limit contact between the child and the 'staying' parent, or a desire to block the other parent from leaving in order to punish that parent.

The parent intending to relocate needs to have a comprehensive and well-thought-out plan for the child in their new location. The court will scrutinise the proposals being put forward, expecting these to have been well researched and investigated. Where the child will live, what school they will go to and how the child's expenses will be met in the new country are all matters the court will consider in each jurisdiction. The defending parent should put forward an alternative proposal to persuade the court the child should stay.

To compensate for the lack of physical contact with the parent left behind, most orders following a permanent removal will be accompanied by generous allowances for remote communication via social media videoconferencing (such as FaceTime, Skype and WhatsApp) and phone calls, as well as an equal division of the child's school holidays.

The child's opinions will be taken into account in each jurisdiction. The process will involve the relevant social welfare department in that country. As part of a report, the child will be interviewed and their views noted. The age and maturity of the child will be an important factor in deciding to what extent the child's preferences will be determinative in the court's balancing exercise of all factors.

All three jurisdictions have signed up to the *Hague Convention of 25 October 1980 on the Civil Aspects of International* ➔

'The age and maturity of the child will be an important factor in deciding to what extent the child's preferences will be determinative in the court's balancing exercise of all factors'

Illustration: Mark Oliver

Child Abduction in respect of children being wrongly removed from their place of habitual residence.

SOME FUNDAMENTAL DIFFERENCES

On issuing proceedings, the court will have jurisdiction over all children. In Singapore, this means until they are 21 years of age; in Hong Kong, until they are 18; and in England and Wales, it depends on the application and the circumstances. It may be that English and Welsh courts will not make an order for a child aged over 16. It is likely to be 'inappropriate and even futile to make orders that conflict with the wishes of an older child', as per Lord Justice Peter Jackson in *Re C*, where the child he referred to was 17 years old.²

In Hong Kong and Singapore, the applicant must seek leave to remove the child. In England and Wales, if both parties consent then the other party may leave permanently without seeking leave. Under English and Welsh law, there is a no-order principle and so the court will only make an order if to do so is better than to not make an order at all.

There are some differences in terminology and legal status. In Singapore, only the parent with 'care and control', and whom the child lives with, can apply to relocate with the child.

The court must carry out a child-focused, proportionate, global and holistic evaluation of each parent's proposals and their impact on the child at the heart of the case. It is unhelpful to categorise cases as 'primary carer' or 'shared care' cases, and each must be approached on their own merit.

Hong Kong

The Hong Kong Court of Appeal in *ZJ v XWN*³ reconsidered the position of the primary carer in light of *K v K*, and confirmed that previous guidelines in *Payne* were simply tools to assist the

Singapore

In *UYK v UYJ*,⁵ Justice Debbie Ong held that 'there is no presumption for or against relocation' and factors that the court would consider in a relocation application include 'the child's age, the child's attachment to each parent, the child's wellbeing in her present country of residence, as well as the child's developmental needs at that particular stage of life'.

Generally, the longer the parties have lived in Singapore, the harder it will be to relocate, and if the child was born there and has only known Singapore as their home, the application is liable to fail. There is also the element of a person's status in Singapore: if their divorce means that they do not have a right to stay, this may be a factor, but if the applicant is a permanent resident, removal may prove to be more difficult. For applications based on a new job opportunity overseas, the applicant will have to prove that it is a necessity, not an option. Businesses should consider if they are unwittingly creating a problem when posting their employees overseas.

CONCLUSION

Fortunately, an analysis of the three jurisdictions considered in this article would suggest that the fundamentals are very similar. As no two cases are exactly alike, the decision on whether to allow relocation is in each case a fact-centric exercise, but there does appear to be a trend against allowing removal as courts move away from the guidelines in *Payne*.

'The court must carry out a child-focused, proportionate, global and holistic evaluation of each parent's proposals and their impact on the child at the heart of the case'

THE APPROACH OF THE COURT IN EACH JURISDICTION: A TREND AGAINST REMOVAL?

England and Wales

The court must bear in mind the statutory presumption that, unless the contrary is shown, the involvement of both parents in the child's life will further their welfare.

One of the leading cases remains *K v K* (*Relocation: Shared Care Arrangement*), where it was said that the 'only principle of law enunciated in *Payne v Payne* is that the welfare of the child is paramount; all the rest is guidance'.³

family judge in making a comprehensive assessment to decide the best interests of the child, after considering the potential impact on both parents. There was no presumption in favour of the primary carer. However, the Family Court of Hong Kong held, in a 2019 case, that *Payne* is not to be jettisoned. The relevant factors provide a structured framework in which the appraisal is to be made holistically. In many Hong Kong cases, *Payne* is viewed favourably. Nevertheless, it has been held that, in cases of shared care, one parent would find it harder to succeed in their application to remove a child.

#COMPLEX FAMILIES

#ENGLAND AND WALES #HONG KONG

#INTERNATIONAL CLIENT

#MATRIMONIAL #SINGAPORE

1 [2001] EWCA Civ 166 2 [2015] EWCA Civ 1298 3 [2011] EWCA Civ 793 4 [2018] HKFLR 452 5 [2020] SGHC 9